No. 12528

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE GRUEN WATCH COMPANY,

Appellant.

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, Individually; LESTER COWAN, Doing Business as Lester Cowan Productions, and BULOVA WATCH COMPANY, INC.,

Appellees.

APPELLEES' BRIEF.

MITCHELL, SILBERBERG & KNUPP, and
LEONARD A. KAUFMAN,
603 Roosevelt Building, Los Angeles 17,
Attorneys for Appellees, Artists Alliance, Inc., Lester Cowan Productions, Lester Cowan, individually, and Lester Cowan, doing business as Lester Cowan Productions.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX.

PAGE

III.

INDEX TO APPENDIX.

Digests of cases cited by defendants under Point II, A, of this Brief: No obligation to include the display in the final version of the motion picture can be implied so as to deprive defendants of their choice to eliminate the display and pay for it.

TABLE OF AUTHORITIES CITED.

STATUTES

TEXTBOOKS

No. 12528

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE GRUEN WATCH COMPANY,

Appellant.

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, Individually; LESTER COWAN, Doing Business as Lester Cowan Productions, and BULOVA WATCH COMPANY, INC.,

Appellees.

APPELLEES' BRIEF.

Statement of Defendants' Contentions.

Defendants entered into a formal binding contract with a group of advertisers, one of which was plaintiff. The contract was complete on its face and unambiguous, and integrated all the essential terms of the agreement. It clearly and unmistakably provided that the advertisers were to furnish displays and that when defendants released their motion picture to the public, defendants would be obligated, in the alternative, either to include the displays as delivered by the advertisers in their picture or pay those advertisers whose displays were not used in the picture the cost of their respective displays. The contract contemplated that defendants might choose *not* to use the displays to promote the advertisers' products, and when defendants were unable to agree with plaintiff on

a joint advertising campaign, defendants did not use the display bearing plaintiff's name and paid plaintiff the cost of the display furnished by plaintiff.

In view of plaintiff's lengthy statement of the facts defendants will not at this point detail their statement of the case but will refer to the facts as they become relevant to the various questions under discussion.

It may facilitate the court's evaluation of the parties' respective contentions if defendants consider plaintiff's arguments as they appear in plaintiff's opening brief.

I.

The Parol Evidence Rule Prohibits Evidence of the Alleged Prior Oral Agreements.

The allegations regarding the alleged oral negotiations and "agreements" between the parties are to be found in paragraphs III, IV and V of the second amended and supplemental complaint (hereinafter referred to as "complaint") [R. 5-6].

The statutes involved are the following:

Section 1625, Civil Code, State of California:

> "*The execution of a contract in writing,* whether the law requires it to be written or not, *supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied* the execution of the instrument." (Emphasis added.)

Section 1639, Civil Code, State of California:

> "*When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible;* subject, however, to the other provisions of this title." (Emphasis added.)

Section 1856, Code of Civil Procedure, State of California:

> *"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be* between the parties and their representatives, or successors in interest, *no evidence of the terms of the agreement other than the contents of the writing,* except in the following cases:
>
> "1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
>
> "2. Where the validity of the agreement is the fact in dispute.
>
> "But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an *extrinsic* ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties." (Emphasis added.)

Plaintiff's discussion of this problem confuses two questions: (1) Is the contract intended to express the entire agreement of the parties? and (2) Are the words used ambiguous? Plaintiff apparently contends, first, that there is no integration because, by using the words "agreements" in paragraph 2 of the contract [R. 20], Kline, plaintiff's agent who drafted it, incorporated certain prior oral agreements into the written contract, and, second, that even if there is an integration, certain words are ambiguous. Defendants contend that the writing *is* an integration, that all the terms are expressed, that there are no ambiguities and that, in any case, the words which plaintiff labels as ambiguous are irrelevant to the question whether defendants could rightfully eliminate the display from their picture by paying its cost.

A. The Written Contract Is an Integration; the Written Contract Does Not Incorporate by Reference Any Prior Oral "Agreements."

It is a question of law for the Court whether a writing is a complete expression of the agreement of the parties. *The Court must determine this question from the four corners of the instrument.*

Thoroman v. David, 199 Cal. 386;

Heffner v. Gross, 179 Cal. 738;

Harrison v. McCormick, 89 Cal. 327.

In the *Thoroman* case, the complaint alleged an agreement between the parties under the terms of which defendant sold to plaintiff certain real property and furniture. Defendant's answer denied that furniture was included in the sale. Plaintiff first introduced escrow instructions which related to the real property only and over defendant's objection then introduced evidence that prior to the signing of the escrow instructions, defendant stated that the furniture was to be included.

Judgment for plaintiff reversed.

> "It is the contention of the plaintiff that the said escrow instructions did not constitute such a written contract as expressed the complete understanding of the parties and that the oral evidence was admissible to supplement the written expression of their understanding. It is the position of the defendant that the said agreement was complete and fully expressed the intention of the parties and that the admission of the oral evidence was in contravention of the well established rule codified in sections 1625 and

1698 of the Civil Code and in section 1856 of the Code of Civil Procedure, and as approved in such cases as *Harrison v. McCormick,* 89 Cal. 327 (23 Am. St. Rep. 469, 26 Pac. 830), *Benson v. Shotwell,* 103 Cal. 166 (37 Pac. 147), and *Heffner v. Gross,* 179 Cal. 738 (178 Pac. 860). In the Harrison case the rule is thus stated: *'The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: "If it imports upon its face to be a complete expression of the whole agreement,—that is, shows such language as imports a complete legal obligation,—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing whatever on the particular one to which the parol evidence is directed."'* . . . The entire consideration passing to the respective parties is expressed in the instrument and the defendant received nothing not called for therein. When so read and considered the instrument contains all the necessary elements of a contract and is to be regarded as a contract in writing between the parties." (Pp. 389-390; emphasis added.)

The written contract [which is attached to the complaint as Exhibit "A"] [R. 20-22] appears on its face to be a complete agreement. The parties and the consideration are expressed. Kline, plaintiff's agent, who drafted this instrument, sets out certain recitals in paragraph 1 and states that he has obtained from his principals, agreements in connection with defendants' use of their respective displays. After naming the advertisers whom he intends to be parties to the agreement, he then sets out

the terms of the understanding and it is clear that he intends to set out all of the terms:

(1) The very first sentence of the written contract reads: *"In confirmation of our present understanding, it is hereby agreed as follows:"* There is no doubt that what follows is intended to be the entire "present" understanding of the parties.

(a) The purpose of a "confirmation" is to set forth the writer's understanding of an agreement to see if it coincides with the understanding of the other party.

(b) It would border on the ridiculous to write, "it is hereby agreed as follows:" and then refer to prior oral agreements without stating those agreements. What was the purpose of Kline's letter? Merely to remind defendants that the parties had already entered into some unspecified oral agreements?

(c) The contract refers to the parties *"present"* understanding.

Restatement of Contracts, Section 228, illustration 2:

"A and B make an oral contract by which A agrees to employ B on certain terms of employment. Immediately thereafter *B writes A a letter beginning, 'Confirming our oral arrangement this morning.'* B then proceeds to state the contract as he understands it. He does not, however, state it in all respects accurately. A makes no reply to the letter. A, thereafter, allows B to enter on the agreed employment. There is an integration. A's acquiescence in B's version of the contract by acceptance of services is a manifestation of assent to the writing as a final and complete expression thereof." (Pp. 308-9; emphasis added.)

In case at bar, both parties acquiesced in the written version of contract by signing it.

(2) It is most obvious, especially to the ordinary reasonable businessman, that Paragraph 2 of the contract is introductory, and serves the sole purpose of identifying the advertiser-parties; that "the essential part of the memorandum agreement dated June 22, 1948 is contained in Paragraphs 3 and 4 . . ." [Comments of District Court, R. 44], and that the parties intended the writing to represent their entire agreement. The identity of each party is made clear and the duty of each is expressed naturally and unambiguously. It is only the desperate dissection of counsel which produces this late afterthought of plaintiff [R. 44].

(3) In Paragraph 2(e) Kline writes, "One or more other companies using advertising signs or displays which may hereafter be included in the terms of *this agreement* by our mutual written statement to that effect." (Emphasis added.) These underscored words show unmistakably that the entire understanding of the parties was embodied in this written contract and was not embodied partially in the written agreement and partially in a prior oral agreement. Furthermore, it would be most unreasonable for the parties to arrange to enter into future written statements to the effect that subsequent advertisers were to be covered by a written instrument which, in turn, merely confirms earlier, unspecified oral agreements.

(4) The last sentence of the written contracts reads: "*If the above is in accordance with your understanding of our agreement,* please indicate the same by signing in the space provided therefor below." (Emphasis added.) This language is explicit in referring to the "above" *written* terms as the entire agreement of the parties.

(5) When parties enter into written contracts, the presumption is that they have *expressed* all the conditions by which they intended to be bound.

Foley v. Euless, 214 Cal. 506, 511-512, 6 P. 2d 956;

Tanner v. Olds, 166 P. 2d 366, 368-9 (Affirmed 173 P. 2d 6);

Loyalton Electric Light Company v. California Pine Box & Lumber Company, 22 Cal. App. 75, 77;

Arthur v. Baron De Hirsch Fund, 121 Fed. 791, 796.

(6) If the parties had intended defendants to have no choice whether to include the display in the motion picture, it would have been natural for Kline to state very simply that "you (Cowan) agree to use these signs in the final version of your picture unless due to circumstances beyond your control." That is the element with respect to which plaintiff wishes to vary the written contract. It is unreasonable on the part of plaintiff to argue that Kline set out the entire contract except this one sentence, which is the heart of the alleged entire agreement, but incorporated it by reference by referring to unspecified "agreements."

(7) The writing is not a casual memorandum, as implied by plaintiff; it is a formal, composed and complete contract, with preambles, numbered paragraphing and careful expression of the terms and conditions.

It is submitted that the written instrument is an integration and that the natural and only interpretation is that the parties intended it to stand alone without supplementation by a portion of their prior oral negotiations or agreement.

The District Court wrote:

> "These clauses [Paragraphs 3 and 4 of the contract] mean that, in view of the fact that certain advertising signs required special outlays of moneys in their construction, Kline's principals—the plaintiff among them—will bear the cost of construction, provided they are included in the 'final version' of the picture. If not, the only penalty is that the defendants would 'bear the cost incurred in connection with the construction and erection' of the 'signs and displays.' By these undertakings, the parties have laid down the conditions of liability. And *no atomizing of the phraseology or expository of references to 'intentions,' 'undertakings' or 'agreements' can destroy the binding finality of the simple, unequivocal obligation contained in these two paragraphs.*" [R. 45; emphasis added.]

B. The Alleged Prior Oral "Agreements" Are Inconsistent With the Written Contract.

The situation, here, is identical with that presented in the *Thoroman* case, set out above. Defendants promised in writing to pay for the sign if it wasn't used; thus the consideration coming from defendants was considered in the written agreement and expressed therein. Plaintiff cannot enlarge defendants' obligations by evidence of a prior oral agreement. Plaintiff is attempting not only to add an entirely different and additional undertaking on the part of defendants(*i. e.*, an obligation in addition to that of paying for the sign if defendants don't use it)—and this with no additional corresponding obligation on the part of plaintiff—but is also actually attempting to vary the terms of the written contract.

The District Court found implied in fact an absolute choice on the part of defendants to use the display or not to use it and pay for it—the choice to be determined at the time Cowan released the picture. The implication is as much a part of the written contract as are the terms which are expressed therein.

> *Delaware & Hudson Canal Company v. Pennsylvania Coal Company,* 19 L. Ed. 349, 353, 8 Wall. 276;
>
> *Calpetro P. Syndicate v. C. M. Woods Co.,* 206 Cal. 246, 250.

That such implication is proper is clear. It is submitted that there is no reasonable doubt that it is defendants who were to determine whether to include the display in the final version of their motion picture or not. It is only defendants who *could* control the contents of the picture. Moreover, it would be totally unreasonable if *plaintiff* could insist that the display not be included in the picture and then demand that they be paid for it.

The principle, embodied in Section 1448, Civil Code, State of California:

> "*Who has the right of selection.* If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation."

is also the holding of the other authorities:

> *Restatement of Contracts,* Section 325, Comment c;
>
> *Blake v. Paramount Pictures,* 22 Fed. Supp. 249, 253 (applying California law);
>
> *Harbor City Canning Co. v. Dant,* 201 Cal. 79, 84, 255 Pac. 795;

Foley v. Euless, 214 Cal. 506, 513, 6 P. 2d 956;

Standard Appliance Co. v. Standard Equipment Co., 296 Fed. 456;

Leezer v. Fluhart, 105 Wash. 618, 178 Pac. 817, 818.

Brockton Olympia Realty Co. v. Lee, 266 Mass. 550, 165 N. E. 873, 876.

In the *Blake* case, *supra,* plaintiff alleged that defendant had orally represented that it would deliver, during the season, a group of specified motion pictures, that defendant had no intention of so delivering the pictures and that defendant fraudulently withheld them and sought to sell them for the following season at increased rentals. The Court, sustaining defendant's demurrer, pointed out that the written contract, in effect, gave defendant a choice of substituting other pictures for those orally named by defendant and wrote:

> "It is elementary that, if one promises to do one thing, or failing, do another, no fraud can result if he made the original promise only without intention to perform; for even if he did, he protected himself by the substitution. And he who has agreed to accept something else for the original promise cannot complain of the fraud in the making of the first one only. Otherwise, the right to elect between alternative obligations would be nullified. This is an important right, codified into the law of California. *When an obligation calls for the performance of one of two acts, in the alternative, the person required to perform has the right to choose.* California Civil Code, §1448." (P. 253; emphasis added.)

It is interesting to note that, in the *Blake* case, the defendant is accused of exercising his choice negatively for the purpose of securing greater revenue for itself, just as, in the case at bar, defendants are "accused" of exercising their choice negatively for the purpose of securing plaintiff's (and if not plaintiff's, then plaintiff's competitor's) participation in the joint advertising program [R. 24, 12]. As to this, Judge Yankwich wrote in the *Blake* case:

> "But the producer-distributor, evidently anticipating that he might not be able to produce the particular productions or that he might not desire to market them within the year or for other reasons,—*perhaps it was the reason advanced by the plaintiff that the distributor might desire to ask a greater price for them later, which, in itself, is merely an incident to the exercise of economic power over production,*—reserved to himself the right of substitution." (P. 252; emphasis added.)

If a contract were to provide that A transfer a designated piece of land to B and that B, at a specified time, was either to keep the land and pay for it or return the deed to A, there could be no question that B, at his sole and unconditional pleasure, had a choice of two alternative performances. It is not conceivable that a promise on the part of B could be implied that he would return the deed only "under circumstances beyond his control," nor would parol evidence be admissible of a prior oral understanding of the parties that B was to return the deed (and not pay for the land) only "under circumstances beyond his control." That is, a choice need not be expressed by using the word "choice." The clear implication of the above hypothetical contract provisions is that B has

such a choice and the hypothetical case is in principle identical with the one at bar.

In *Arthur v. Baron De Hirsch Fund,* 121 Fed. 791, 795, the parties had executed a written contract under the terms of which defendant agreed to loan plaintiff a certain sum to be used in the erection of houses on land belonging to plaintiff, on which plaintiff agreed to give a mortgage to secure the loan. It was further stipulated that plaintiff should sell the houses to such purchasers as defendant should name. *If defendant did not name a grantee when a house was finished, plaintiff was to lease the house.*

On failure of defendant to provide purchasers for the houses, plaintiff sued for breach of contract. The trial judge directed verdict for defendant at the close of plaintiff's evidence. Affirmed.

This case is discussed below (in connection with plaintiff's theory that an absolute promise on the part of defendants to use the display should be implied in plaintiff's favor) and defendants will not repeat that discussion here beyond repeating one paragraph of the opinion which is immediately relevant:

> "'*When it is apparent that the parties had the subject in question in mind, and either has withheld an express promise in regard to it, one will not be implied.*' *Zorkowski v. Astor,* 156 N. Y. 393, 50 N. E. 983. *That the parties contemplated that the defendant might not find purchasers is plain, because the contract provides that, if the defendant does not name the grantee 'as soon as the house is finished,' the plaintiff is to let or lease every one of the houses* at specified monthly rentals, no term of lease being fixed. It is true *this provision contemplates that the houses are to be leased to tenants to be secured*

*by the defendant, but nevertheless it denotes their understanding that the defendant might not secure purchasers, * * * This provision is quite inconsistent with the theory that the parties understood or intended that the defendant should be bound to produce purchasers."* (P. 795; emphasis added.)

In the language of the above quoted case, it is apparent that defendants and Kline had the subject of defendants' use of the display in mind and that defendants withheld an express promise in regard to it. That the parties contemplated that defendants might decide not to use the display in his picture is plain, because the contract provides that if defendants do not use the display in the final version of their motion picture, plaintiff is entitled to be reimbursed for the cost of the display. It is true that the provisions of Paragraphs 3 and 4 of the June 22nd contract contemplate that defendants *might* decide to use the display, but nevertheless denote their understanding that they might decide *not* to use it. These provisions are *"quite inconsistent with the theory that the parties understood or intended that the defendant should be bound"* to use the sign. Thus, parol evidence of a prior oral agreement that defendants would use the sign in the final version of their motion picture (except under circumstances beyond his control) would vary the terms of the written contract.

If the parties here, had intended that defendants be absolutely obligated to use the sign (except under circumstances beyond his control) the parties would have said so expressly. As the Court said in the *Arthur* case (in response to plaintiff's contention) "if this was the understanding of the parties, *why was this most important covenant omitted?"*

Defendants respectfully refer the Court to the language of the cases quoted below (Point II, A) in connection with plaintiff's argument that a definite promise to use the display should be implied. These cases, like the *Arthur* case, hold that *if a written contract expresses the consequences of failure on the part of one party to do a specified act, then he is not obligated to do that act, and evidence of an oral understanding that he is so obligated* IS *"quite inconsistent" with the written contract.*

C. If a Writing Upon Its Face Appears to Be an Integration Parol Evidence Cannot Be Admitted to Add Another Term to the Agreement, Even if Not Inconsistent With It.

Even if the alleged two prior oral "agreements" were not inconsistent with the written contract, evidence of them is inadmissible.

Thoroman v. David, 199 Cal. 386, 389;

Heffner v. Gross, 179 Cal. 738;

Calpetro P. Syndicate v. C. M. Woods Co., 206 Cal. 246, 251-2.

> "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be . . . no evidence of the terms of the agreement other than the contents of the writing . . ."

Section 1856, Code of Civil Procedure, State of California.

Thus, inconsistency is not required to bar, as a matter of substantive law, evidence of a prior or contemporaneous oral agreement.

D. The Complaint Itself Demonstrates That the Word, "Agreements," Cannot Refer to a Definite Promise by Defendants to Use the Display.

In attempting to circumvent the parol evidence rule, plaintiff artifically divides the prior oral negotiations into *two* separate "agreements":

Plaintiff alleges in Paragraph III of the complaint [R. 5] that the parties orally agreed that defendants would definitely use the display in the motion picture. Plaintiff alleges in Paragraph IV of the complaint [R. 5-6] that:

> "Concurrently with the agreement referred to in paragraph III, and in recognition of the fact that due to circumstances beyond the control of defendants Cowan, it might be necessary to cut the scene containing plaintiff's display from said picture, it was understood and agreed between plaintiff and the defendants Cowan that in such event defendants Cowan would bear the cost of such sign and display."

Reading Paragraphs III and IV together, it is clear that plaintiff seeks to allege a prior oral agreement that defendants would use the display unless it were necessary to cut it out because of circumstances beyond their control.

If the word, "agreements," of the introductory Paragraph 2 of the written contract was intended to incorporate a prior agreement between plaintiff and defendants, it would naturally be expected to incorporate the *entire* prior oral agreement. That, however, is not possible here, since Paragraph 4 of the written contract expresses *part* of the alleged prior oral agreement and, in view of this, it would be strange that Paragraph 2 incorporate the *entire prior agreement*. (And, as already pointed out, it

is made doubly strange by the fact that the written contract expresses only a *subsidiary* term and not the alleged *essential* one.) Faced with this problem, plaintiff meets it by its queer division of the alleged prior agreement into two "agreements"—one which is incorporated by reference into the written contract and the other which is not [Paragraph V of Complaint, R. 6].

Aside from the obstacle that the alleged prior oral agreements are inconsistent with the written contract (Point I, B, *supra*), that the written contract is an integration (Point I, A) and the unreasonableness of its two-concurrent-prior-oral-agreements theory, plaintiff is faced with a difficulty of logic which, it is suggested, demonstrates that the word, "agreements," of Paragraph 2 of the contract *cannot* refer to a definite promise on the part of defendants that they would use the display.

Kline, plaintiff's agent, wrote, in Paragraph 2 of the contract which he addressed to defendants, that he has "*obtained from the hereinafter specified advertisers* agreements in connection with your use of their respective signs and displays" [R. 20; emphasis added].

The complaint [Paragraph III, R. 5] alleges that Kline, *himself,* on behalf of plaintiff, entered into the oral agreement with defendants that defendants definitely use the display. Therefore, *this alleged prior oral agreement cannot be the one which Kline "obtained from the hereinafter specified advertisers."* That is, Kline would not write to defendants that he had received from his clients an agreement which *he himself* had already entered into with defendants. It is clear that when Kline wrote that he had obtained "agreements" from certain advertisers, he was saying that he had obtained their assent to a deal, and Kline then proceeds to set out the terms

of the deal. It is clear that Kline is referring to his receipt of such assent on the part of the various advertisers and not to any agreements, in the sense of *contracts* that Cowan would definitely use the sign in his picture. *Kline could not have received from plaintiff a promise on the part of defendants to use the display.*

E. The Words and Phrases Designated by Plaintiff as "Ambiguous" Are Not Ambiguous, and, Moreover, Have No Bearing on the Question Whether Defendants Were Definitely Obligated to Use the Display.

(1) The phrase "plans and intentions" (Pltf. Op. Br. 12, 17) is found in Paragraph 1 of the written contract (which is a *recital* or preamble to the agreement). It is not true that "such plans and intentions are not set forth"; the paragraph reads:

> "1. You have advised me of your plans and intentions to produce a feature length sound and talking motion picture presently entitled "Hearts and Diamonds," in which the Marx Brothers will be co-starred. You have further advised me that certain scenes and sequences in the picture will be devoted to the activities of one or more of the Marx Brothers in connection with various advertisings and displays."

The phrase is not ambiguous.

Even if it were ambiguous, it still is *irrelevant to the performance promised by defendants in the agreement.* It is this performance, required of defendants by the contract, which is the "matter" with which we are now concerned. (See *Civ. Code,* Sec. 1625, *supra.*) *If* the complaint were deficient in that it failed to show a promise

by defendants which they failed to perform, *the resolution of an ambiguity relating to defendants' "plans and intentions" would cure this deficiency of plaintiff's case.*

(2) The word "request" (Pltf. Op. Br. 12-13, 17) is found in Paragraph 2 of the written contract (which, too, is merely a preamble). The observations made above in connection with item (1) are applicable here; moreover, defendants' request that Kline line up advertisers for a deal has no bearing on the content of the contract entered into.

(3) The word "agreements" (Pltf. Op. Br. 12-13, 17) also is found in Paragraph 2 of the written contract and is not *ambiguous.* The meaning of the word is clear; the only possible question could be whether, by the use of that word, the written contract incorporates terms not expressed therein; that is, whether the use of the word shows that the written contract is not an integration so far as defendants' required performance is concerned. This aspect of the case was fully discussed above (Point I, A).

(4) The word "use" (Pltf. Op. Br. 13, 17) is found in the same sentence of the preliminary recital of the written contract as the word, "agreement." It adds nothing to plaintiff's argument; the sole question still is whether the word, "agreement," must be construed to mean that the written contract is incomplete in the particular with which we are concerned.

(5) There is no conceivable difference between the words "included" and "actually included" (Pltf. Op. Br. 13, 17) found in Paragraphs 3 and 4 of the written contract. How can a sign be included in a motion picture other than "actually"?

(6) Any ambiguity in the phrase "substantially in the manner represented to you" (Pltf. Op. Br. 17-18) is irrelevant to the question whether defendants were obligated to use the display. Whatever the "manner represented" may have been, defendants either did or did not use the display "substantially in the manner represented"; if they did, plaintiff got what it is now arguing for; if they did not, plaintiff was entitled only to be reimbursed for the cost of the sign. In any event plaintiff admits that "this particular clause may not necessarily be material to the present dispute." (Op. Br. 17.)

Finally, the complaint nowhere alleges that the prior oral "agreements" contained any terms which *would* explain the words "substantially in the manner represented to you" (or any of the other of the above discussed words or phrases which plaintiff contends are ambiguous).

Plaintiff states (Op. Br. 13) that the written contract does not specify "(a) whether one of the parties was to have the right of determining whether or not such inclusion was to take place, or (b) whether such determination was not in fact intended by the parties to be governed by matters beyond the control of either party."

Defendants discussed plaintiff's contention (a) above (Point I, B). "The party required to perform has the right of selection" (Civ. Code, Sec. 1488).

Whether defendants' absolute right of selection can be limited by evidence of prior oral "agreements" has also been discussed above.

F. Authorities Cited by Plaintiff.

Plaintiff refers to the alleged oral agreements as "contemporaneous" (Op. Br. 14). The complaint alleges that they were not contemporaneous, but *prior*: after setting out the so-called oral agreements in Paragraphs III and IV, plaintiff alleges in Paragraph V [R. 6] that "*thereafter* * * * plaintiff and defendants Cowan executed memorandum of agreement dated June 22, 1948." (Emphasis added.) But whether contemporaneous or prior, the alleged oral agreements are barred. Civil Code, Section 1625, *supra,* expressly refers to stipulations "which preceded or accompanied the execution of the instrument."

Simmons v. California Inst. of Technology, 34 Cal. 2d 264, 172 P. 2d 665 (Pltf. Op. Br. 14-15), was, unlike the case at bar, one of *fraud,* and, of course, the parol evidence rule has no application. In fraud cases the only requirement for the admissibility of an alleged contemporaneous fraudulent promise is that it not vary the expressed terms. If it does not, it will be admitted even if the writing appears on its face to be complete. Not so when fraud is not alleged: if the writing appears to be an integration, evidence of prior oral agreement is in no event admissible. (See Point I, C, *supra.*)

Moreover, in the *Simmons* case, the subject matter of the oral agreement was entirely different from the subject matter of any of the terms of the written agreement. As the Court said:

> "'* * * a distinction must be made between * * * a parol promise * * * which by its very nature is superseded by the final writing, inconsistent with it, *and a promise made with no intention of performing the same, not inconsistent*

with the writing, but which was the inducing cause thereof.'" (P. 274.)

Detsch & Co. v. American Products Co., 152 F. 2d 473, also cited by plaintiff (Op. Br. 15) merely held that a contemporaneous oral agreement was admissible to "make certain the content and extent of the broad and undefined word 'cooperate' in the written contract." (P. 474.) As pointed out above, the question before the Court here does not relate to ambiguous language.

In *Webb v. Cobb* (Ark. 1926), 288 S. W. 897 (Pltf. Op. Br. 15), where a building contract required that work be done "in keeping with plans and specifications," extrinsic evidence, of course, was admissible to show what those "plans and specifications" were.

If, in the instant case, the written contract had contained language which indicated that the parties thereto had entered into prior oral agreements in addition to the terms of the written document and meant to incorporate those prior oral agreements, then they could be shown by extrinsic evidence. But that is not the case here. Defendants' point is that there *is* no incorporation by reference.

In *Kellog v. Snell,* 93 Cal. App. 717, 270 Pac. 232 (Pltf. Op. Br. 15-16), the contract provision that buyer "accept a position with said bank under conditions *otherwise* agreed upon" of course requires extraneous evidence of what the parties *"otherwise"*—that is, otherwise than in the written contract—agreed upon. The Court itself italicized the phrase *"otherwise agreed upon"* and wrote:

> "The written contract itself specifically contemplates an agreement for this employment upon terms not included within this written document, for it is therein specified that respondent would 'accept a posi-

tion with said bank under conditions *otherwise agreed upon.'"* (P. 720.)

In *Schmidt v. Cain,* 95 Cal. App. 378, 272 Pac. 803 (Pltf. Op. Br. 16), the Court wrote:

> "* * * that parol evidence of the terms and conditions of a contemporaneous oral agreement is competent and admissible, *which does not vary or conflict with the specific provisions of the written instrument."* (P. 382.)

but that

> "* * * the rule contended for by appellant has no application here, because there was a collateral contemporaneous oral agreement containing terms and conditions, upon which the written instrument is entirely silent." (P. 382.)

Compare *Restatement of Contracts, Section 228, Illustration 2:*

> "A and B make an oral contract by which A agrees to employ B on certain terms of employment. Immediately thereafter B writes A a letter beginning, 'Confirming our oral arrangement this morning.' B then proceeds to state the contract as he understands it * * * there is an integration * * *"

In the case at bar the letter begins, "In *confirmation* of our *present* understanding it is *hereby* agreed *as follows:* * * *" [R. 20]. And in the case at bar, the written contract is *not silent* on the matter of defendants' obligation (as was shown above), while in the *Schmidt* case it said nothing whatsoever about warranties. The arguments set forth above (Points I A, B and D) all are applicable to the contract in the case at bar but not to that in the *Schmidt* case.

It is suggested that the other cases cited by plaintiff in this section of its brief are not in point. These cases

involved the interpretation of the language of the written agreement—language which was ambiguous, meaningless, technical or inconsistent. The language was such as to

> "admit of two interpretations * * * The trial court should therefore have permitted appellant to plead and prove the surrounding circumstances, not for the purpose of varying the terms of the written instrument, but for the purpose of aiding the court in interpreting the contract of the parties as embodied in the written instrument."
>
> *Wachs v. Wachs,* 11 Cal. 2d 322, 326 (Pltf. Op. Br. 18-19).

The "sense and meaning of the words themselves may be investigated."

> *Body-Steffner Co. v. Flotill Products Incorporated,* 63 Cal. App. 2d 555, 562 (Pltf. Op. Br. 19-20).

"Special, technical, definite and peculiar meaning" may be explained.

> *California Canning Peach Growers v. Williams,* 11 Cal. 2d 221, 229 (Pltf. Op. Br. 20).

An "uncertainty upon the face of the contract" such as the phrase "suitable for the needs of the owner" may be explained.

> *Crawford v. France,* 219 Cal. 439, 444 (Pltf. Op. Br. 20-21).

As pointed out above, we are not here concerned with ambiguities of language: (a) there are no ambiguities; (b) the alleged ambiguities relate to matters not relevant and the resolution of which could not cure the deficiencies of plaintiff's pleading. We are concerned with the sole question of whether the June 22nd contract purports on its face to be an expression of the agreement of the parties as to defendants' required performance.

II.

No Obligation Can Be Implied With Respect to Defendants' Use of the Display.

A. No Obligation to Include the Display in the Final Version of Motion Picture Can Be Implied so as to Deprive Defendants of Their Choice to Eliminate the Display and Pay for It.

Nowhere in the written contract do defendants promise or agree under any circumstances, to include any shots of plaintiff's sign in their picture. No such promise or agreement can possibly be implied since the agreement itself indicates clearly that the only obligation defendants undertake is to bear the cost of the sign in the event they determine not to use it in the picture [see District Court's Comment, R. 45]. The agreement expressly contemplates that defendants may decide *not* to use the sign in the picture; it provides that the advertisers bear the cost "provided that their respective advertising signs and displays are included in the final version of your picture as released to the general public" (Paragraph 3 of agreement) and that if the sign is not included in the picture, then defendants are to bear its cost (Paragraph 4 of agreement).

The legal principles by which the Court may be guided in determining this point may fairly be summarized as follows:

(1) A promise will be implied only where an act which one of the contracting parties is bound to perform can be done by him only if something of a

corresponding character be done by the opposite party. In such a case, a correlative obligation on the part of the opposite party may be implied for the purpose of enabling the first party to fulfill his obligation.

Delaware & Hudson Canal Company v. Pennsylvania Coal Company, 19 L. Ed. 349, 8 Wall. 276.

(a) Only such provisions will be implied as are indispensable to effectuate the intention of the parties as it arises from the language of the contract.

Amalgamated Gum Co. v. Casein Co. of America, 146 Fed. 900, 908, 909, 915;

Walter R. Cliffe Co. v. Du Pont Engineering Co., 298 Fed. 649, 651.

(b) When parties have entered into written contracts, courts are reluctant to enlarge them by implication, the presumption being that they have expressed all the conditions by which they intended to be bound.

Foley v. Euless, 214 Cal. 506, 511-512, 6 P. 2d 956;

Tanner v. Olds, 166 P. 2d 366, 368-9 (Affirmed 173 P. 2d 6);

Loyalton Electric Light Company v. California Pine Box & Lumber Company, 22 Cal. App. 75, 77;

Arthur v. Baron De Hirsch Fund, 121 F. 791, 796.

(2) Even if the contentions of (1), above, are satisfied, an implied promise cannot be found if the expressed language of the agreement either negatives such implication, or is intentionally silent on the point. The agreement is held to be so intentionally silent when the parties expressed themselves on the point but did not express the promise sought to be implied.

Walter R. Cliffe Co. v. Du Pont Engineering Co., 298 Fed. 649;

Foley v. Euless, 214 Cal. 506, 511, 6 P. 2d 956;

Tanner v. Olds, 166 P. 2d 366, 368 (Affirmed 173 P. 2d 6);

Arthur v. Baron De Hirsch Fund, 121 Fed. 791, 795, 796;

Ericksen v. Edmonds School Dist No. 15, 125 P. 2d 275, 280;

Railroad Service and Advertising Co. v. Lazell, 200 App. Div. 536, 537.

(a) *The statement of the consequences to follow in the event one party fails or refuses to do a certain act, prevents the implication that that party agreed to do that act. In such a case, the party has an option to do or not to do the act.*

Amalgamated Gum Co. v. Casein Co. of America, 146 Fed. 900, 908, 909, 910-911, 913-914;

Arthur v. Baron De Hirsch Fund, 121 Fed. 791, 795-796.

(3) Parol evidence is not admissible to establish an implied promise; such promise must be gathered from the language of the contract.

Delaware & Hudson Canal Company v. Pennsylvania Coal Company, 19 L. Ed. 349, 353, 8 Wall. 276;

Maryland v. B. & O. Railroad Company, 22 L. Ed. 713, 714, 22 Wall. 105;

Arthur v. Baron De Hirsch Fund, 121 Fed. 791, 795.

The facts and pertinent language of the cases cited under this Point II, A, are set out, for the convenience of the Court, in the Appendix.

Not only is the covenant which plaintiff seeks to imply not "indispensable" but is *negatived* by the written contract itself: The provision that defendants pay the cost of the display if they do not include it in the final version of their motion picture indicates that defendants might choose *not* to so include it.

In *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.,* 19 L. Ed. 349, 8 Wall. 276 (set out in the Appendix), plaintiff spent $900,000.00 improving its canal in anticipation of large shipments of coal to be made by defendant pursuant to their written contract. When defendant induced plaintiff's competitor to construct a railroad and shipped its coal over the competitor's road, plaintiff sought damages on the theory that defendant impliedly agreed to use plaintiff's canal. The Supreme Court held in defend-

ant's favor under circumstances much more favorable to plaintiff than in the case at bar: (a) plaintiff there, unlike Gruen, was *not* compensated for its expenditures, and (b) there was no provision in the written contract as to an alternative obligation on the part of defendant if defendant did not ship its coal through plaintiff's canal. The Court said that

> "it is quite evident that the plaintiffs were willing to accept the *prospect* of increased freight for transportation upon their canal as affording full compensation for the concession which they made in the articles of agreement." (P. 354; emphasis added.)

B. A Covenant of Good Faith Cannot Be Implied to Aid Plaintiff.

Plaintiff contends (Op. Br. 22) that the court should find in the written contract an implied covenant of good faith which imposes two duties on defendants.

The first alleged duty is to use defendants' best efforts to include the display in the picture. In this connection plaintiff cites *Wood v. Lucy, Lady Duff-Gordon*, 222 N. Y. 88, 118 N. E. 214 (Op. Br. 23). The Court in that case wrote:

> "The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties." (P. 214.)

And

> "The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business 'efficacy, as both parties must have intended that at all events it should have.' Bowen, L. J., in the Moorcock, 14 P. D. 64, 68. But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trade-marks as may in his judgment be necessary to protect the rights and articles affected by the agreement." (Pp. 214-215.)

In the case at bar, the written contract expressed the consequences of not using the display, so that the parties obviously contemplated that defendants might choose not to use it. Not only was this not true in the *Wood* case, but, as can be seen from the above quoted portions of the opinion, it affirmatively appeared that the exclusive licensee was to have certain duties in return for receiving the privileges. If, in the *Wood* case, the written contract had stated that the exclusive licensee was to pay $10,000 if he chose not to exploit plaintiff's designs, there would be no question that damages could not be recovered against

him for failure to exploit the designs, if he paid the $10,000. Moreover, in the *Wood* case the contract would have been entirely nugatory without such an implied covenant on the part of the exclusive licensee. This is the classical situation in which a promise will be implied.

Plaintiff asserts (Op. Br. 24) that unless there is an implied obligation on the part of defendants to use the display, "the letter memorandum was no agreement at all." This assertion is patently untrue, for defendants, like all promisors who obligate themselves to perform one of several alternative obligations, were obligated to, and did, perform one of those alternative obligations: it paid the cost of the display.

The following cases cited by plaintiff (*Brawley v. Crosby Research Foundation, Inc.* (1946), 73 Cal. App. 2d 103, 166 P. 2d 392; *Universal Sales Corp. v. California Press Mfg. Co.* (1942), 20 Cal. 2d 751, 128 P. 2d 665; *Clayton & Waller, Ltd. v. Oliver* (1930), A. C. 209; *Marbe v. Edwards, Ltd.* (1928), 1 K. B. 269, and *Mills-Morris Co. v. Champion Spark Plug Co.* (C. C. A. 6, 1925), 7 F. 2d 38) (Pltf. Op. Br. 25-28), are subject to similar criticism. In none of these cases did the agreement provide alternative obligations, nor express in any manner the obligations of the defendant if he failed to perform the first obligation.

It is submitted that *Norfolk & N. B. Hosiery Co. v. Arnold,* 45 Atl. 608, may have been presented by plaintiff in a misleading manner (Op. Br. 25-27). The contract in that case provided that, *as to machines furnished by*

defendant, plaintiff was to advance the cost and, on termination of the agreement, defendant was to repay their cost to plaintiff upon the return of the machines by plaintiff to defendant; as to machines *not* furnished by defendant, they were to be turned over to plaintiff at cost price "on her or their election to so purchase them." The controversy concerned *machines which defendant furnished to plaintiff,* that is, machines as to which defendant definitely promised to reimburse plaintiff. Defendant contended that she had an option to purchase or not to purchase these machines by virtue of the contract provision which related to machines *not* furnished by defendant. The case is not relevant to any question which arises in the case at bar.

The balance of this section of plaintiff's Opening Brief relates to matters which plaintiff takes up in detail in a later portion of its brief (relating to "estoppel") and defendants will not now discuss those matters except to point out that the complaint does not allege that defendants *requested* the release of publicity by plaintiff, as stated by plaintiff (Op. Br. 29).

The second duty which plaintiff asks this Court to impose upon defendants, as part of the implied covenant of good faith, is "to avoid the use of plaintiff's sign and display in the monstrous manner in which it ultimately utilized it in this case, to-wit, with the name of one of plaintiff's competitors affixed thereto." (Op. Br. 22.) Plaintiff cites no authority whatsoever for this contention but discusses it under its Point IV, and defendants will discuss it later in this brief.

III.

Defendants' Conduct Subsequent to Execution of the Contract.

> "Cowan had complete freedom of action, as between the two methods of benefitting from the contract, *up to and including the actual incorporation and use of the set-up in the 'final version' of the picture.*" Comment of District Court [R. 48; emphasis added.]

Plaintiff argues that, even granting this original freedom of action on the part of defendants, they deprived themselves of that freedom—that choice between two alternative obligations—by their conduct between the time they executed the contract and the time they finally released the motion picture to the general public.

A. Defendants Made No Binding Election to Use the Display.

1. No "Option" Existed Which Defendants Could Elect to Exercise.

An option, legally and in the sense the word was used in the cases cited by plaintiff, is a continuing offer. *An option is an offer of an act or a promise on the part of the optionor in return for an act or promise on the part of the optionee.*

At the time the defendants authorized the Life article and did the other acts upon which plaintiff rely as constituting an "election," plaintiff had performed everything it was obligated to perform under the terms of the June 22nd contract; that is plaintiff had already furnished the display [Complaint, Par. VII, R. 7]. There were no offers open, pending or unaccepted. There was

nothing for defendants to accept. Defendants simply had a choice between two alternative obligations to be exercised at the time the picture was released; they either had to use the Gruen display or pay for it. The language of the law of "options" is, therefore, irrelevant.

The situation before this Court is exactly the same as in this hypothetical case: A and B execute a contract under the terms of which A agrees to give B an automobile on January 1st and B agrees to give A, on July 1st, either a horse or a cow, whichever he, B, may choose. On January 1st, A delivers the automobile. On February 1st, five months before B is obligated to render one of the two alternative performances, B tells A that he intends to give A the horse. Whatever may be A's right on an *estoppel* theory, there is no question of option, in the legal sense, involved. On February 1st, when B made his statement of intention, there was no offer remaining, from A to B, which had not been accepted; and, since an option is but a continuing offer, none existed in the illustration given, nor in the case at bar.

In a situation where a real option exists, the exercise of the option creates a binding promise on the part of the optionor and a binding promise on the part of the optionee. In the case at bar, plaintiff seeks to obtain additional consideration from the "optionee" defendants, without any additional consideration moving from plaintiff and without plaintiff promising anything additional. Specifically, by virtue of the alleged "election," plaintiff asserts that defendants gave up the privilege of determining, at the time of the final release of the picture, to omit the display from the picture, while plaintiff gives nothing by way of an act or a promise, in return for Cowan thus limiting his freedom.

The District Court outlined its analysis as follows:

> "Absent any ambiguity, the argument derived by analogy from the law of options and by which it is sought to construe certain acts of the defendants as an irrevocable exercise of choice, lose all significance. In an option, a binding contract arises when the optionee exercises the right under the option. . . . Strictly speaking, we are not confronted here with an option—*i. e.,* with a contract which gave the optionee 'a right against the optionor for performance of the contract to which the option relates upon the exercise of the option.' (Warner Bros. Pictures v. Brodel, *supra,* p. 773.)" [R. 46-7.]

Defendants had a privilege of choice as was the situation in *Murchie v. The Mail Pub. Co. Ltd.,* 42 New Brunswick Reports 36; there, plaintiff had the right to choose a chaperon for a trip which she had won in a prize contest, and did make a choice. Subsequently she changed her mind and advised defendant that she desired another person to act as chaperon. Defendant refused to make the substitution, plaintiff did not go on the trip, and successfully sued for damages. The Court pointed out (p. 43) that the indication by plaintiff of her choice was not "in the nature of the execution of a power" and that so long as defendant was not prejudiced by the change plaintiff could change her mind. Similarly in the instant case the only relevant theory available to plaintiff is that of estoppel, hereinafter discussed.

Crane-Rankin Development Co. v. Duke, 185 Okla. 223, 90 P. 2d 883, cited and discussed by plaintiff (Op. Br. 34), concerned a typical option to sell an interest in an oil well. The Court simply held that the option had been exercised. Upon the exercise of the option a promise

arose on the part of defendant to pay the price and a promise on the part of plaintiff arose to convey the interest. The contract there provided that:

> " '* * * said option to be exercised on or before the 30th day of June 1935, and upon the acceptance of said option and the payment of said cash consideration first party agrees to execute proper assignment of said leases and said oil payments hereinbefore described.' "

The Court rightly held that the option could be exercised by a statement to that effect on the part of the optionee. The optionee was thereafter obligated to perform in accordance with the promise which arose upon the exercise of the option.

The Court, in the *Crane-Rankin* case called attention to the well recognized distinction between the *exercise* of an option (acceptance of the offer) and *performance* of the obligation assumed by that exercise. Plaintiff charges the trial court, in the case at bar, with overlooking that distinction (Op. Br. 32, 35). That is not so. Plaintiff's charge *assumes* that defendants alleged representations (that they intended to include the display in the picture) constituted a binding "election" just as the exercise of an option constitutes a binding acceptance of the continuing offer; plaintiff thus begs the question. *In the absence of an open offer from plaintiff, defendants' acts, indicating intention to forego one alternative, are no more binding than they would have been if there were no contractual relationship whatsoever between the parties.* Defendants' representation,—or even *promise*—that they would relinquish their freedom of choice is not binding in the absence of an estoppel, since there was no consideration for it.

The complaint alleges that on April 20, 1949, defendants "notified plaintiff that they had eliminated and would not use in the motion picture 'Love Happy' any reference to plaintiff" [R. 13-14]. Plaintiff argues that "if defendants by such a mere letter could make an election," then they could make an election prior to April 20 (Op. Br. 32, 36). Again, plaintiff begs the question. Defendants contend that no binding *election* was possible either on or before April 20; whether defendants' conduct *estopped* them from choosing to omit the display from the picture remains to be seen.

In *Hankey v. Employer's Casualty Co.,* 176 S. W. 2d 357 (Pltf. Op. Br. 32-4), plaintiff pleaded an *option.*

> "According to plaintiff's pleadings, the insurance company was the optionee of the option pled. 'An option is a mere offer which binds the optionee to nothing and which he may or may not accept as his election, within the time specified. Until so accepted it is not, in legal effect, a completed contract, but when accepted * * * it becomes a completed contract, binding on both parties' 10 Tex. Jur., pp. 56, 57. Therefore, according to the allegations of plaintiff's petition, as construed in his original opinion, the insurance company by electing not to take title to the automobile but to return it to plaintiff, and communicating such election to plaintiff, fixed the right of plaintiff to the title and ownership of said automobile. In other words, the option, which continued to be a mere offer until the insurance company elected to pay damages and return the automobile in its damaged condition, becomes a contract to do so upon the acceptance of the offer contained in the option, and the communication to plaintiff of such acceptance

by the insurance company. *There is nothing in the option as pled which would prevent a verbal acceptance.*

"It is true that we have liberally construed the allegations of plaintiff's petition in order to sustain the jurisdiction of the Court which he sought to invoke." (176 S. W. 2d 357, 362; emphasis added.)

In the case at bar it is not *possible* to find an offer from Gruen to Cowan which could have been accepted at the time Cowan did the acts relied upon by plaintiff; defendants simply promised that if, at the time they released the picture the display was omitted, or if the picture were released after January 1, 1950, they would reimburse plaintiff. The language of the Texas Court is entirely irrelevant.

In the case at bar, defendants' choice was to be made at the time the picture was released to the general public; in the *Hankey* case, no time was specified within which to exercise the option. In the case at bar, if defendants did nothing, they would automatically have become obligated to pay plaintiff the cost of the display; in the *Hankey* case defendant *had* to express an election or plaintiff's rights would *never* become fixed. In other words, *in the case at bar it was contemplated that defendants make their choice by performing one of two acts: including the display in the picture or paying its cost when the picture was released; in the Hankey case it was contemplated that defendant make its choice by an expression of choice—not by an act.*

The crucial difference between the *Hankey* case and the one at bar is so aptly expressed by the California Supreme Court in *Norris v. Harris,* 15 Cal. 226, that defendants feel impelled to quote the pertinent language therefrom; it clearly shows that the doctrine of election has no application to the situation before this Court:

> "It only remains to consider the validity of the counter-claim upon which the defendants recovered judgment. The determination of this point depends upon the construction of that clause in the bill of sale which provides that if Norris, on his arrival in Texas, should choose to take all the cattle without a count, he should notify the agent of the defendants in possession of his intention to do so, and in consideration thereof, pay the further sum of $4,000; but if a count was had, and the cattle exceeded or fell short of the estimated number of 7,000, the excess or deficiency should be paid for at the rate of eight dollars per head. No count was ever made, no notification was ever given by Norris that he chose to take the cattle without a count; but on the trial, which was brought on in the absence of plaintiff's counsel, judgment was taken for $4,000, as though there had been such notification * * *. In this respect the judgment is clearly erroneous. * * *
>
> *"The doctrine of election, upon which the defendants attempt to sustain the counter claim, has no application to the contract in this case.* That doctrine applies only to cases where the party, upon whom rests the performance, stands in the same position to both alternatives presented, *and is bound to indicate his choice between them.* Here there was no obligation resting upon Norris to choose between two things; *he was not bound to indicate any choice,*

only in the event of desiring to take the cattle without a count. If he did not desire to do so, he was not required to give notice to that effect. The obligation to pay for the excess over the estimated number, if there were any, was absolute, without any expression of choice; but the obligation to pay the $4,000 was a conditional one, dependent solely upon the indication of his desire to dispense with the count.

"In cases where the doctrine is applicable, the right of election, upon failure of the party upon whom the performance rests to indicate his choice, passes to the other side, as in this way only can the obligation become absolute and determinate. *Thus, if a debtor, by a given day, is to pay money or furnish goods, it is evident that upon a failure to indicate which of the two he will do, the obligation would be indefinite and uncertain* [like the *Hankey* case]. But this is quite different from a contract to do a certain thing absolutely by a given day, with the privilege of discharging the obligation in some other way previously. *In such case, if the privilege be not exercised, the obligation is not left in uncertainty, but is definite and absolute* [like the case at bar]. So, in the present case, the failure or refusal of Norris to indicate any desire to take the cattle without a count, did not leave the character of his obligation in any respect indefinite and uncertain." (Pp. 257-8; emphasis added.)

So in the case at bar, defendants were "not bound to indicate any choice"; they were bound, necessarily, to make their choice at the time of the picture's release. If, at that time, they failed to include the display they were bound, automatically, to pay for it. The language of "election" is irrelevant.

Finally, the June 22nd contract states that plaintiff will bear the cost of the display if it is included in the final version of the picture, provided such picture is actually released to the general public not later than January 1, 1950. Supposing the picture was not so released until after January 1, 1950, does the alleged exercise of the "option" commit defendants to release the picture before that date? If defendants released the picture after that date, are they obligated to include plaintiff's display and also to reimburse plaintiff for the cost?

2. Defendants Did Not Exercise the Option, if One Existed (Defendants' Conduct Did Not Constitute an "Election").

(a) *Defendants' Conduct Cannot Be Interpreted to Mean That Defendants Were Relinquishing Their Freedom of Choice.*

As above stated, an option is an *offer*. It must be accepted like any offer and is subject to the rules of offer and acceptance.

> *"An acceptance must be positive and unambiguous."*
>
> *Williston on Contracts, Sec. 72.*

As an illustration of insufficient acceptances, Williston gives the following, from decided cases, among which are the following:

> "I have decided on taking No. 22 Belgrade Road, and have spoken to my agent Mr. C., who will arrange matters with you."
>
> "You are low bidder. Come on morning train."
>
> "Telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week."

> "Have attempted twice the tender of the first payment of $500.00 upon the agreement between us on the 7th of December last. I will meet you, etc., when I shall be ready to make tender of the money and execute the proper agreements thereupon."

So whether we talk in terms of "acceptance" or "exercise of option" or "election of obligation," it is necessary, if plaintiff is to prevail, that it show a "positive and unambiguous" representation on the part of defendants that they would definitely include the display in picture when it was released to the general public.

What was the significance of "alleged declarations and acts" which plaintiff sets forth as "indicating defendants' election"? (Op. Br. 35.)

(1) "The actual use of the sign in the production of the motion picture * * *" It is self-evident that the parties *contemplated* that defendants photograph the display prior to releasing the picture. Since defendants had an absolute choice of including or omitting the display *when released,* obviously they had to photograph it before making their decision.

(2) "* * * prompt return to plaintiff of the sign and display *without their tendering its cost."* Defendants were not obligated to make their choice until final release of the motion picture; plaintiff here argues, in effect, that since defendants didn't elect to *omit* the display *prior* to the release of the picture, it elected to include the display!

(3) "* * * the expression by producer-defendants of their desire to publicize their motion picture in 'Life Magazine' and the release of photographs of plaintiff's sign and display." This is in the same category as (1),

supra. Of course, a motion picture is publicized prior to its release to the public; that, too, was contemplated by the parties. How, then, can such publicity be evidence of an exercise of an option, or an election? When defendants "encouraged" Life to publicize the picture they contemplated using and intended to use the display in the motion picture, but by no stretch of the imagination can that be contorted into a promise on the part of defendants, who had the privilege of not using the sign if it so chose, to give up its option and definitely use the sign in the final version of the picture.

(4) The two letters from defendants' director of publicity to plaintiff's public relations director [R. 22-24], sent between the date of the written contract and the date of the release of the picture, also show that defendants, at least up to October 4, 1948, contemplated using the display if the cooperative newspaper campaign, referred to in the second letter [R. 24] was worked out between the parties. Can these be construed as a definite promise on the part of defendants so as to irrevocably commit them to use the display in the final version of the motion picture? It is submitted that no reasonable business would so interpret these letters after the parties have entered into a written contract which *expressly* gives defendants the important choice exercisable when the picture is finally released.

The District Court wrote in its Comment [R. 48]: "the letters written subsequent to the execution of the contract did not alter the situation."

(5) "* * * the actual publication in Life * * *." The remarks made under (3), *supra*, are applicable here. Plaintiff emphasizes that the article appeared in Life on

February 7, 1949, just five days prior to the date which defendants' letter of October 4, 1948, stated was the time set for the premiere. Plaintiff thus attempts to make it appear that defendants permitted the Life article to appear at a time when the premiere was five days off. That is not true, as appears in the complaint itself. The premiere actually was held some time after June 24, 1949, the date of filing of the original complaint [Complaint, Para. XVII, R. 15], not less than four and one-half months after the publication of the Life article. (Defendants' letter of October 4, 1948, merely shows that *as of that date* defendants intended to release the picture on February 12, 1949.)

It is submitted that defendants' acts did not constitute "positive and unambiguous" representations that they would voluntarily, and without compensation, give up their privilege of omitting the display from their motion picture. This is even more convincingly clear when defendants' acts are compared with the direct statements made by defendants in other cases wherein the courts held that they were insufficient: see illustrations from decided cases, noted by Williston, *supra.*

(b) *An Offer Must Be Accepted at the Time Specified in the Offer.*

If an offer can be said to have existed, by virtue of Paragraphs 3 and 4 of the June 22nd contract, that offer was to be accepted at the time of release to the general public.

(c) *An Offer Must Be Accepted in the Manner Required by the Offer.*

The manner of acceptance required by the June 22nd agreement—again assuming that an unaccepted offer can be found to exist at all—was by inclusion "in the final version of your picture as released to the general public."

(In this connection, defendants wish to refer to plaintiff's contention that defendants have confused the exercise of an option and the performance to be rendered after the exercise. In the case at bar, if there was an option, the acceptance thereof and the performance required of defendants was the very same act, namely, including the display in the final version of the motion picture as released to the general public.)

B. Defendants Are Not Estopped so as to Be Deprived of Their Choice to Omit the Display and Pay for It.

Plaintiff's contention in connection with its "estoppel" theory assumes, as indeed it has to, that defendants had an absolute choice in determining whether to use the display in the picture, but plaintiff argues, in effect, that defendants, by their acts, promised to forego their privilege of omitting the display (and paying for it). The complaint alleges no consideration for this promise, but, apparently, plaintiff urges that, under the circumstances, no consideration was required since plaintiff acted in reliance on the representations to be inferred from defendants' acts.

Thus, plaintiff relies on "promissory estoppel," which is stated in Section 90 of the *Restatement of Contracts* as follows:

> "A *promise* which the promisor should *reasonably expect* to induce action or forbearance of a *definite*

and *substantial* character on the part of the promisee and which does induce such action or forbearance is binding *if injustice can be avoided only by enforcement of the promise.*" (Emphasis added.)

Thus, before plaintiff can successfully plead a cause of action on the basis of this doctrine, it must allege the following elements:

(1) A *promise* on the part of defendants.

(2) That *defendants should reasonably have expected* that their promise would induce action on the part of plaintiff.

(3) That that action would be *definite.*

(4) That that action would be *substantial.*

(5) That the promise does in fact induce such action.

(6) That injustice can be avoided only by the enforcement of the promise (despite the fact that there is no consideration for the promise).

1. Defendants Made No Representation Which Can Be Construed as a Definite Promise to Use the Display.

Plaintiff enumerates the acts upon which it relies as constituting a promise to use the display (Op. Br. 37-8); these are, substantially, the acts upon which plaintiff relies as constituting a binding "election" (or exercise of option) under its "election" theory. Defendants immediate criticism of plaintiff's "estoppel" theory is similar to that of plaintiff's "election" theory, and, for the purpose of avoiding repetition, the Court is respectfully referred to Point III, A, 2, a, *supra.*

Defendants do wish to call the Court's attention specifically to plaintiff's statements (Op. Br. 38) that defend-

ants "permitted" and "induced" plaintiff to release publicity. There is no allegation whatsoever in the complaint that defendants permitted or induced the release of publicity by plaintiff, nor even that defendants ever knew of such release of publicity.

The California law requires that, to be the foundation of an estoppel, a representation of future intention be *"absolute in form."*

Seymour v. Oelrichs, 156 Cal. 782, 798.

> "The representation, further, to justify a prudent man in acting upon it, must be plain, not doubtful, or matter of questionable inference. *Certainty* is essential to all estoppels."
>
> *Bigelow, Estoppel,* 6th Ed., p. 641.

To the same effect is *Veatch v. Standard Oil Company,* 49 Fed. Supp. 45, 49, aff'd 134 F. 2d 173.

2. Defendants Should Not Reasonably Have Expected That Their Acts Would Induce Action on the Part of Plaintiff.

No normal businessman would have acted on the strength of defendants' actions, especially after the parties had entered into a written contract giving defendants the absolute choice of omitting the display.

3. Defendants Should Not Reasonably Have Anticipated Any Specific Action by Plaintiff.

There is no allegation in the complaint which might indicate that defendants should have known that their acts would induce plaintiff to release publicity to trade papers.

> "A promise of one thousand dollars with which to buy a motor car may thus be binding if it induces the

purchase of the car. A promise of one thousand dollars for no specified purpose will not be binding, though it induces similar action."

1 *Williston on Contracts* 504.

4. Defendants Should Not Reasonably Have Expected That Their Acts Would Induce Action of a Substantial Character on the Part of Plaintiff and Plaintiff's Action Was Not Substantial.

The mere fact that plaintiff called the special attention of its dealers to the Life article (which they probably would have seen anyway) surely does not amount to "substantial" action.

In *Veatch v. Standard Oil Company,* 49 Fed. Supp. 45, aff'd 134 F. 2d 173, the Court wrote:

> *"In the cases of 'promissory estoppel,' which have been enforced by the court, it appears that the alleged promise has been an express promise in specific terms and the action or forbearance of the promisee has resulted in some substantial detriment to the promisee, and that such detriment was either intended by the promisor or else 'he should reasonably have expected such detriment would be incurred.'*—Williston on Contracts (Revised Edition), Vol. 1, p. 502, s. 139." (P. 49; emphasis added.)

Williston, in his work on Contracts, writes:

> "It should be noticed that no slight acts or merely technical reliance will serve." (P. 499.)
>
> "The binding thread in all of the classes of cases which have been enumerated is a *justifiable reliance of the promisee and the hardship involved in refusal to enforce the promise.*" (P. 501; emphasis added.)

See:

Bard v. Kent, 19 Cal. 2d 449.

5. Defendants Did Not Act for the Purpose of Inducing Action by Plaintiff.

The California law requires that a representation, to be the basis of an estoppel, be "deliberately made for the purpose of influencing the conduct of the other party."

Seymour v. Oelrichs, 156 Cal. 782, 798.

The complaints contain no allegation to satisfy this requirement.

Plaintiff points out (Op. Br. 37), in its quotation of part of a sentence taken from California Jurisprudence in this section of its brief, that the party against whom the doctrine of estoppel is invoked must have *elected* one of two inconsistent courses. This would, of course, bring us back to the question of whether defendants have so elected. Defendants argued above that they did not. Moreover, the authority from which plaintiff quotes, states, immediately preceding the portion set out by plaintiff, that "this doctrine resembles that of election, ratification and affirmance * * * a person with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct *to the injury of another.*" The illustrations given by this authority, which plaintiff neglects to set out, are of an entirely different character from the situation in the case at bar. One of the more familiar illustrations is:

> "By trying a case on the theory that certain facts are in issue, the parties are estopped on appeal to claim that they were omitted."

Plaintiff fails to state a single case where a party successfully invoked the doctrine of estoppel under circumstances similar to those in the case at bar.

IV.

Since Defendants Paid the Cost of the Display They Were Free to Make Such Use of It as They Pleased.

The District Court wrote in its comments:

> "The undertaking on the part of the representative of the plaintiff was that they would construct certain advertising displays or lay-outs—to use the newspaper phrase—and that, if Cowan incorporated them in their 'final' picture, the cost would be borne by the advertiser. If not, the cost was to be borne by Cowan. The first line in Paragraph 3 recites that expenses are to be incurred 'in preparing for your use,' the advertisements and displays. So it seems to me that the inescapable conclusion is that stated in the prior memorandum which summed up the agreement in the two sentences: 'The only penalty for not using the display is liability for price. * * * Cowan was free to do what he pleased with the property if he paid for it.'" [R. 47.]
>
> "For, if, as we hold, the agreement called for the construction of these layouts for Cowan's use, *their non-use with the plaintiff's name on it called* [*for*], as the only penalty, *liability for its cost*—a different liability cannot be thrust upon either Cowan or Bulova because Cowan, having paid for the layout, was, as stated in the prior memorandum, 'free to do what he pleased with it.'" [R. 49; emphasis added.]

It is submitted that the District Court has correctly stated the "binding finality of the simple, unequivocal obligation contained in these two paragraphs." [R. 45; referring to Paragraphs 3 and 4 of the written contract.]

The principle that

> "The consideration draws to it the equitable right of property; the person from whom the consideration actually comes, under whatever form or appearance, is the true and beneficial owner."
>
> 3 *Pomeroy's Equity Jurisprudence,* 5th Ed., p. 897.

is recognized in several situations similar or analogous to that found in the instant case:

When the original owner of chattels recovers for conversion of his property, the converter-defendant becomes the owner of the property as a matter of law.

When an architect furnishes plans and is paid for them, the *builder* owns the plans (even though the contract is silent on the point).

> *Berlinghof v. Lincoln County,* 128 Neb. 28, 257 N. W. 373;
>
> *Hill v. Sheffield,* 117 N. Y. Supp. 99;
>
> *Windrim v. City of Philadelphia,* 9 Phila. 550;

and the architect cannot prevent *any* use of those plans. Thus, it has been held that an architect cannot prevent even a stranger to the contract (between the architect and builder) from using the plans to build a house of his own; the plans belong to the builder.

> *Wright v. Eisle,* 83 N. Y. Supp. 887.

In *In re Galt,* 120 Fed. 64, the Court, faced with construing a contract as one of bailment or conditional sale, held that it was one of bailment. The Court pointed out that "* * * nowhere in the agreement does the latter [defendants Cowan] covenant to pay for these goods as in the case of a sale." (P. 69.) The implication is clear that if defendant *had* covenanted to pay the cost he would have owned the property.

The contract provides that plaintiff prepare the display for defendants' use. Defendants were to pay nothing if they used the display to advertise plaintiff's product, but if they used it for any other purpose—or didn't use it at all—defendants were to pay for it. *Paragraph 4 of the contract recognizes the possibility of a use other than that to advertise plaintiff's product* by providing that "you [defendants] will bear the cost incurred in connection with the construction and erection of any or all of such signs and displays which are *not actually included in the picture substantially in the manner presently represented to you.*" [R. 21.] The contract thus contemplates that the display might be used in a manner not as represented (in which case defendants would be obligated to pay its cost).

Plaintiff devotes a large portion of this section of its argument (Op. Br. 43-45) to *Liggett & Meyer Tobacco Co. v. Meyer,* 101 Ind. App. 420, 194 N. E. 206, which holds that a *novel* idea embodied in concrete form can be the subject of a sale and that an *implied* contract to pay the reasonable value may arise when the defendant knowingly receives and uses property sent him under such circumstances as indicate that a sale is intended.

If plaintiff here, in the absence of an express contract, had submitted to defendants a novel idea under circumstances which indicated that plaintiff expected to be paid for it if used, an implied contract might arise. But there are several reasons why that is not true in the case at bar:

(1) An implied agreement by defendants to pay for the reasonable value of the idea is *negatived by the expressed contract.* The contract expressly provides the amount defendants are to pay if they did not use the display "as represented."

It would surely be strange if Cowan were "free to do what he pleased with the property" yet not free to use the so-called "idea" embodied in it.

(2) The idea in no sense can be said to be a novel one. What can be said to be novel or original about the use of an illuminated clock with a swinging pendulum? That is the alleged "idea." It can hardly be said to be an idea at all.

Ball, *The Law of Copyright and Literary Property*, Sec. 227.

The purpose of the requirement that an idea be novel before it is protectible, is not to permit one person from forever precluding another from using a common idea—one in the public domain—merely by suggesting it to him. Defendants certainly cannot be precluded from using the idea of a neon clock in one of his pictures because plaintiff suggested it to them.

National Telephone Director Co. v. Dawson etc. (1924), 214 Mo. App. 691, 263 S. W. 483, cited by plaintiff (Op. Br. 42), adds nothing to plaintiff's argument. Defendants in the case at bar passed nothing off as belonging to plaintiff, they did not misappropriate any property belonging to plaintiff and had the right to use the film as they chose, since *they paid for that right.*

Plaintiff speaks (Op. Br. 40-41) of the "alternative acts," referred to in California Civil Code, Section 1450, as though, in the instant case, they were "use" and "non-use" of the display. Once again, defendants submit, plaintiff begs the question; the question *is*, precisely, *whether* the alternative acts were (1) "use" and (2) "non-use," or whether the alternative acts were (1) use "as represented" (*i. e.*, to advertise plaintiff's product), and (2) payment of the cost of the display. Defendants have

argued above that, as the District Court held, it is the latter set of alternative acts which satisfy the language of the written contract and which are fair and equitable.

Plaintiff refers (Op. Br. 41) to its "literary property rights." Nowhere in the complaint can it be found what that "literary property" was, nor is there any allegation that it was original material. And *there is no allegation whatsoever in the complaint that defendants used any literary property belonging to plaintiff!*

It should be noted, too, that nowhere in the complaint is it alleged that the display furnished by plaintiff was distinctive, that it had been closely associated with plaintiff's name or that there was any secondary meaning. The display was simply a common neon-outlined clock with no commercial significance whatsoever.

Under Point II, B, *supra,* defendants indicated that they would, at this point, refer to plaintiff's contention that a covenant should be implied on the part of defendants not to use the display without plaintiff's name on it. As pointed out under Point II, a covenant may be implied only when it is *indispensable* to effectuate the intention of the parties as it arises from the language of the contract or to prevent one party from interfering with the other's enjoyment of the consideration he was to receive. In the instant case that consideration was the cost of the display. Moreover, since defendants had the right to do with the property (or at least the film) as they pleased, having paid for the display, of course no covenant can be implied limiting defendants' right. Plaintiff is urging this Court, *on the basis of good faith and fair dealing,* that it be permitted to keep the display, to retain all rights in connection with its use and, also, to collect from defendants the cost of the display!

V.

Motions to Strike.

The portions of the complaint which defendants moved to strike are underscored in the Appendix to Plaintiff's Opening Brief.

Defendant's motions to strike designated as A, C, D and E refer to matter which is relevant only if plaintiff can introduce parol evidence of the alleged prior oral agreements, and the District Court's order granting said motions should be affirmed unless the judgment of the law or court is reversed on this ground (Point I of Brief).

Motions B, F and Q should have been denied only if plaintiff has stated a cause of action for piracy of an idea (Point IV of Brief).

Motions G, H, I, K and L should have been denied only if plaintiff has stated a cause of action based on "estoppel" or "election" (Point III of Brief).

Motion J should have been denied only if plaintiff has stated a cause of action based on "estoppel" (Point III(2) of Brief).

Motions M, N, O and S should have been denied only if plaintiff has stated a cause of action sounding in tort, since exemplary damages are not allowable in contract actions.

State of California, Civil Code, Sec. 3294.

Motion P should have been granted as the allegation is a conclusion of law.

Motion R should have been granted because it refers to alleged elements of damage which are not recoverable under *any* theory advanced by plainitff. In the first place, they are highly speculative and uncertain. In the second place, if plaintiff recovers for breach of contract to include the display in the picture, it is entitled to the fair value of the advertising it would have received and to nothing else; if plaintiff recovers for piracy of idea it is entitled merely to the decrease in value of that idea by defendants' wrongful use thereof; if plaintiff recovers on the theory of an implied sale of the idea, it is entitled merely to the fair value of the idea.

It is submitted that the judgment below should be affirmed.

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP, and
LEONARD A. KAUFMAN,

Attorneys for Appellees, Artists Alliance, Inc., Lester Cowan Productions, Lester Cowan, individually, and Lester Cowan, doing business as Lester Cowan Productions.

APPENDIX.

Digests of Cases Cited by Defendants under Point II, A, of their Brief: No obligation to include the display in the final version of the motion picture can be implied so as to deprive defendants of their choice to eliminate the display and pay for it.

The reporter's headnote preceding the opinion in *Amalgamated Gum Co. v. Casein Co. of America,* 146 Fed. 900, succinctly sets forth the facts therein:

> "Plaintiff, a manufacturer of a patented paper coating under a secret process, for the purpose of marketing the same, agreed to sell to defendant as its sole customer on condition that defendant should accept specified quantities of the product, but that if defendant should not accept such quantities, then plaintiff should be at liberty to sell to others. The agreement then required plaintiff to sell further quantities 'if asked for', and due notice given by defendant, the last clause of the agreement being that it was understood and agreed that in certain contingencies or the happening of unforeseen events impairing the ability of either party to perform the conditions of the contract as to the 'furnishing or using' of the quantity of products previously provided for, then the parties should be relieved during the period of such disability from 'furnishing or taking' such products, otherwise than the capacity and ability of the parties to 'supply or use' the amount required. The contract also provided for payment for amounts 'taken' by defendant. Held, that the contract did not contain any covenant or obligation binding defendant to accept or take the product in the amounts specified, and that no such covenant could be implied." (pp. 900-1.)

The Court quotes the following language from the agreement with which it was concerned:

> "The said party of the first part agrees to sell * * * unto the said party of the second part, upon condition that the said party of the second part shall accept from the party of the first part * * * *but in case the said party of the second part shall not accept* from the said party of the first part the quantity of said products hereinbefore set forth in any of the years above described, then and in that case it is understood and agreed that the said party of the first part shall be and is at liberty to sell its paper coating products in the United States and Canada without reference to the said party of the second part except to protect the said party of the second part with such customers of the party of the second part as shall be supplied with said products of the said party of the first part direct by the party of the second part." (Emphasis added.)

and stated:

> "I fail to discover any good and sufficient reason for the insertion of this language if there was or was supposed to be an outright and absolute agreement on the part of defendant to take the product in the amounts specified. It seems to me to be a provision that demonstrates the plaintiff did not understand defendant was binding itself to take the product." (p. 908.)

The Court held that an agreement to take the product could not be implied from the language of the entire contract. In fact, the language negatives any idea of an

agreement on the part of defendants to purchase, take or accept plaintiff's product or any of it:

> "* * * why was a clause imposing such obligation omitted? Why were words clearly importing a purchase or an obligation and an agreement to purchase, or take, or accept such quantities omitted? *The parties evidently had the particular matter or subject in mind, but in place of language plainly implying an agreement to purchase, take, and accept and pay for the amount of the product specified deliberately selected words indicating the contrary purpose.*" (p. 909.) (Emphasis added.)
>
> "* * * defendant did not agree and was not required to agree to take or accept such quantities or any quantity whatever. The absence of any agreement in words to purchase or accept or of any equivalent expression is very significant. Again, *the parties have expressly agreed on what the consequences shall be if defendant does not accept the quantities of the product specified, and, under the authorities, where this is the case no further covenant or agreement on that subject will be implied. Hawkins v. United States,* 96 U. S. 689-697, 24 L. Ed. 607-610. Also, see numerous cases cited 15 Am. & Eng. Encyc. of Law, 1078." (pp. 910-911.)

The provision that in case defendant should not accept a specified amount of the product, plaintiff could then go in and occupy the market in the named territory, "fairly implies" that defendant had the right not to accept any (pp. 913-914).

In *Arthur v. Baron De Hirsch Fund*, 121 Fed. 791, the parties executed a written contract under the terms of which defendant agreed to loan plaintiff a certain sum to be used in the erection of houses on land belonging to

plaintiff, on which plaintiff agreed to give a mortgage to secure the loan. It was further stipulated that plaintiff should sell the houses to such purchasers as defendants should name, provided the purchaser would assume the payment of the mortgage to defendant, pay ten per cent of the price in cash, and execute a second mortgage to the plaintiff for the balance.

On the failure of defendant to provide purchasers for the houses, plaintiff sues for breach of contract, contending that defendant impliedly agreed to so secure purchasers.

The trial judge directed a verdict for the defendant at the close of plaintiff's evidence. Affirmed.

> "The general rule applicable to the question to be determined is expressed in *Hudson Canal Co. v. Pennsylvania Coal Co.,* 8 Wall. 288, 19 L. Ed. 349, as follows:
>
> 'Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule, unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect.'
>
> "There are many cases in which contracts have been construed to impose an obligation not expressed upon one of the parties, when, in its absence, there would have been no consideration for the undertaking on the part of the other party; but those cases in which particular contracts have been held to imply such an obligation do not greatly aid the present inquiry. * * *.

"Undoubtedly, the parties to the present contract contemplated and expected that the defendant would find purchasers for the houses, and knew that the failure or *refusal* of the defendant to do so would deprive the plaintiff of some of its anticipated benefits; but that fact, and the consideration that, although the plaintiff covenanted to sell to purchasers named by the defendant, the defendant did not covenant to find purchasers, are not enough, in view of the other provisions by which substantial benefits were secured to the plaintiff to raise the implied promise.

'*When it is apparent that the parties had the subject in question in mind, and either has withheld an express promise in regard to it, one will not* be implied.' *Zorkowski v. Astor,* 156 N. Y. 393, 50 N. E. 983. *That the parties contemplated that the defendant might not find purchasers is plain, because the contract provides that, if the defendant does not name the grantee 'as soon as the house is finished,' the plaintiff is to let or lease every one of the houses at specified monthly rentals, no term of lease being fixed.* It is true *this provision contemplates that the houses are to be leased to tenants to be secured by the defendant, but nevertheless it denotes their understanding that the defendant might not secure purchasers,* and in that case that the plaintiff, while under an obligation to accept the tenants, should not be required to accept them for any definite period. *This provision is quite inconsistent with the theory that the parties understood or intended that the defendant should be bound to produce purchasers.*

"The agreement sought to be implied is, in effect, one that the defendant would purchase the houses. If this was the understanding of the parties, why was this most important covenant omitted? And if it is to be implied, how does it happen that the

contract contained no provision obligating the plaintiff to sell, but left it within the power of the plaintiff to exact terms to which no purchaser might be willing to accede? Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. *The presumption is that, having expressed some, they have expressed all, of the conditions by which they intended to be bound.*" (Pp. 795-796; emphasis added.)

Railroad Service and Advertising Company v. Lazell, 200 App. Div. 536 at 537:

> "The acceptance of the offer to pay a definite sum for the placing of the advertising cards cannot be said to imply that the plaintiff agreed to place the advertising, for paragraph 2 of the acceptance expressly permits the plaintiff to remove at any time all or any part of the advertising matter covered by the alleged contract."

Delaware & Hudson Canal Company v. Pennsylvania Coal Company, 19 L. Ed. 349, 8 Wall. 276:

The complaint *alleged* that the defendants agreed that all coal mined by them in their coal mines and transported over their railroad to the place where the railroad connects with the canal of the plaintiff, should be transported from that place to tidewaters upon plaintiff's canal and that they would pay to plaintiff the toll prescribed. The contract, however, contained no such express undertaking by defendants and plaintiff seeks to imply one.

In their agreement the plaintiff agreed to furnish at all times thereafter, all the facilities of their canal to the boats of the defendant, at specified toll charges, with the

proviso that plaintiff should not be bound to allow any quantity of defendant's coal to be transported in excess of a certain tonnage per season unless they should enlarge their canal.

Defendant agreed to use all their influence to cause the speedy construction of a railroad from the coal lands which they owned to plaintiff's canal and agreed that if the construction of the railroad was not commenced within one year and completed within three years, plaintiff may declare the agreement null and void.

Defendant constructed the railroad and put it into operation and plaintiff immediately entered upon the work of enlarging their canal and they "continued to prosecute the work with diligence and at great expense until the same was completed."

Defendant induced another railroad company to construct a branch road and connect it with their railroad at the same place where the latter connects with plaintiff's canal and defendant thereafter diverted their coal to be transported over the branch railroad of the other company to the tidewaters (to plaintiff's damage in the sum of $900,000.00).

> "Provision is made by the agreement, it is admitted, that the rates of toll to be charged by the plaintiffs shall be permanently reduced, and the *plaintiffs contend that the defendants, in consideration of that stipulation assumed a correlative obligation to send all their coal brought over their railroad to market upon the plaintiffs' canal.* * * * plaintiffs contend that the obligation in that respect is so plainly contemplated by the agreement that the law will enforce it as an implied covenant as fully as if it were expressed in appropriate words" (p. 353).

Judgment rendered in favor of defendant, after demurrer sustained, affirmed.

"Undoubtedly, necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect; as where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law in such a case, if the contract is so framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfill his contract. *Churchward v. The Queen,* Law Rep. 1 Q. B. 195" (p. 353).

"Reference is made by the plaintiffs to the provision of the agreement extending certain facilities to the boats of the defendants and covenanting for a permanent reduction in the rates of toll upon the plaintiffs' canal, as calling for a different construction of the articles of agreement, but *it is quite obvious that those concessions were made as inducements to the defendants to locate and construct the contemplated railroad from their coal lands to the plaintiffs' canal, so as to form a continuous line of transportation from the coal mines, over the canal, to tidewaters. Great advantages were expected to result from*

the completion of that railroad, and it is quite evident that the plaintiffs were willing to accept the PROSPECT *of increased freight for transportation upon their canal as affording full compensation for the concession which they made in the articles of agreement"* (p. 354; emphasis added).

Foley v. Euless, 214 Cal. 506, 6 P. 2d 956:

Plaintiff, fruit packer, entered into written contract with defendants, representatives of a pool of grape growers. Plaintiff agreed to receive at his packing house such of the raisins of the pool members which defendants will have the members of the pool deliver to plaintiff's packing house not later than January 1, 1930. Plaintiff agreed to process these grapes and market them and compensation was provided for.

Plaintiff seeks recovery of $100,000.00 for breach of contract, alleged to be defendant's failure to cause the members of the pool to deliver their grapes to plaintiff's packing house. Plaintiff contends that "as the agreement prohibited him receiving at the described packing house any other raisins of the varieties named, and that as the agreement was to remain in force and effect until all the raisins delivered had been processed, sold, and delivered to buyers, there was an implied covenant on the part of the respondents to cause all of the growers' raisins to be delivered to him."

Demurrer sustained without leave to amend, affirmed.

"Courts have been careful not to rewrite contracts for parties by inserting an implied provision, unless, from the language employed, such implied provision

is necessary to carry out the intention of the parties. No implied condition can be inserted as against the express terms of the contract or to supply a covenant upon which it was intentionally silent. * * *

"* * *

"With these rules of law in mind we cannot conclude that there was an implied obligation on the part of respondents to cause the pool members to deliver all of their raisins to appellant. *The omission of such a covenant might have been intentional* on the part of respondents, as the quantity of raisins to be delivered might be determined by them and be governed entirely by the good faith of appellant in performing his obligations and his success in marketing those delivered. The executed contract was clear in its terms and left to the judgment of respondents the quantity of raisins to be delivered. Had appellant desired a covenant requiring a given number of tons of raisins or all of the growers' raisins to be delivered to him, he should have had such a provision inserted in the contract. We cannot rewrite the agreement for him" (pp. 511-512).

Tanner v. Olds, 166 P. 2d 366 (affirmed 173 P. 2d 6).

The parties were adjoining land owners who entered into a community oil lease as lessors, expressly providing that in the event the lessee should quitclaim any lots from the lease the owners of such lots would nevertheless continue to participate in the royalties to the same designated extent. Further, it was expressly provided in the community lease that if and when a lot was quitclaimed back to the owner the community lessee would have the right of ingress and egress over the quitclaimed lot, would have

the right to lay pipe thereon, and have the right to retain eight acres around each community well, even though such acreage might include a portion of the quitclaimed lot.

The lessee did, in fact, quitclaim back to defendant her lot. Defendant then leased her lot to "X" and received royalties from "X," and, at the same time, continued to receive her portion of the royalties from the community lease. The operations on the land by "X" drained oil from the community pool and plaintiff, another lessor to the community lease, contends that the court should imply a provision in the community lease to the effect that:

> " 'While the owner of a quitclaimed lot may produce oil therefrom he shall be prohibited from producing the same when to do so will cause any drainage from the common pool from which the community wells were producing or forfeit his right to his share of the community lease royalty.'
>
> "Such a provision would be contrary to the express terms of the contract which named only three restrictions upon a quitclaimed lot. The law is settled that an implied condition cannot be inserted in a contract as against the express terms of the contract or to supply a condition upon which the contract is intentionally silent. (*Tanner v. Title Insurance & Trust Co.*, 20 Cal. 2d 814, 824, 129 P. 2d 383; *Foley v. Euless*, 214 Cal. 506, 511, 6 P. 2d 956.) Had the parties desired to put a further restriction upon a quitclaimed lot, such as appellants seek to have the court imply, they could have done so by inserting such a provision in the lease. (See *Clark v. Elsinore Oil Co.*, 138 Cal. App. 6, 31 P. 2d 476.)
>
> "It is not our duty to alter a contract by construction or to make a new contract for the parties. We

> are confined to the interpretation of the agreement, which the parties have made for themselves, without regard to its wisdom or folly as shown by events subsequent to the execution of the contract. * * * it cannot reasonably be said that the contract was incomplete or that some implied covenant should be read into contract to equalize the advantages of the parties" (pp. 368-9).

Maryland v. B. & O. Railroad Company, 22 L. Ed. 713, 22 Wall. 105:

The Court in refusing to imply an undertaking on the part of defendants, wrote:

> "Conceding that such an undertaking may be implied, when there is no express promise to pay in gold, still the implication must be found in the language of the contract. It is not to be gathered from the presumed or the real expectations of the parties" (p. 714).

It is "inadmissible to deduce an implication of a promise, not from the contract itself, but from the extraneous fact that such a promise ought to have been exacted. Ordinarily a reference to what are called surrounding circumstances is allowed for the purpose of ascertaining the subject matter of a contract, or for an explanation of the terms used, *not for the purpose of adding a new and distinct undertaking"* (p. 715; emphasis added).

In *Loyalton Electric Light Company v. California Pine Box & Lumber Company,* 22 Cal. App. 75, the parties in their written agreement had expressly obligated them-

selves to do certain things and the Court refused to enlarge their obligations by implication. Demurrer to the complaint was sustained and judgment rendered thereafter was affirmed by the Appellate Court. In the case at bar, defendant, Artists Alliance, agreed only to bear the cost of the sign if it did not advertise plaintiff's name in the picture; having thus undertaken a definite obligation with respect to the subject matter, another obligation cannot be implied to use the sign under any circumstances.

In *Walter R. Cliffe Co. v. Du Pont Engineering Co.,* 298 Fed. 649, and *Ericksen v. Edmonds School District No. 15,* 125 P. 2d 275, plaintiffs relied on the well accepted general rule of law that there rises an implied obligation on the part of a party to a contract not to hinder or delay the performance of the other party's obligations. While recognizing this general rule of law, judgment went for defendants in both cases because of language in the contracts involved which negatived such an implied obligation on their parts. In the *Cliffe* case, this result was reached by sustaining defendants' demurrer to the complaint.